NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

PETER CHARLES EDWIN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-11708 & A-11804 Trial Court Nos. 4FA-13-1424 CR & 4FA-02-494 CR MEMORANDUM OPINION No. 6343 — June 1, 2016

Appeal from the District and Superior Courts, Fourth Judicial District, Fairbanks, Patrick S. Hammers and Douglas Blankenship, Judges.

Appearances: Kelly R. Taylor, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Patricia L. Haines, Assistant District Attorney, Fairbanks, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

A district court jury convicted Peter Charles Edwin of two counts of first-degree harassment for touching the clothed buttocks of a woman working in a gift shop.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Edwin appeals his convictions, alleging that the evidence at trial was insufficient to establish his identity as the perpetrator or, alternatively, to prove that the touching was offensive or done with an intent to harass or annoy. We find that the evidence was sufficient to support the convictions, but we agree with the State's concession that the convictions should merge.

At the time of this offense, Edwin was on probation for a prior sex offense. As a result of his harassment convictions, the State filed a petition to revoke probation in that earlier case. A superior court judge revoked Edwin's probation and imposed a 3-year sentence. Edwin challenges this probation-revocation sentence as excessive. We find that the judge was not clearly mistaken in imposing 3 years of Edwin's suspended 5-year sentence for his prior sex offense.

Background facts

Viewed in the light most favorable to upholding the verdicts,[1] the evidence at Edwin's trial established the following: On the Friday before Memorial Day 2013, Edwin walked into the gift shop at the Santa Senior Center in North Pole, Alaska. A seventy-year-old woman was working as a clerk in the shop. The gift shop consisted of two disconnected narrow rooms that were each five feet wide, and that displayed items hand-made by members of the senior center.

As the clerk showed items to Edwin, he positioned himself behind her and rubbed his crotch against her buttocks while masturbating. The clerk moved to the gift shop's second room to show him items there with the hope that he would stop touching her. But Edwin continued to rub up against her there as well. This recurred during a thirty-minute time period as the clerk alternated between the two rooms of the gift shop.

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[1] *See Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

When another employee, an eighty-four-year-old woman, witnessed what Edwin was doing, she ended the encounter by announcing the closure of the gift shop.

Two days later, Edwin returned to the gift shop. When the second employee spoke to him, he said his name was "Peter." Edwin departed, but the employee followed him and jotted down the license plate number of the car he was driving. The police were able to locate and arrest Edwin.

The State charged Edwin with two counts of first-degree harassment. At trial, Edwin's attorney cross-examined witnesses to highlight that the clerk could not actually see what was occurring behind her, that the extreme narrowness of the rooms might lead to innocent bodily contact, and that the second woman had a somewhat obscured view of the scene. During final argument, the defense attorney noted that neither the clerk nor the second employee directly challenged Edwin during the thirty-minute period.

The jury convicted Edwin of both counts. This appeal ensued.

The evidence was sufficient to support the verdicts

To convict Edwin of first-degree harassment, the State had to prove that he touched the clerk's buttocks through her clothing, that this touching was offensive, and that Edwin intended to harass or annoy the clerk.[2] When, as here, a defendant challenges the sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the jury's verdict and then ask whether, viewing the evidence in that light, a reasonable juror could have concluded that the State's case was proven beyond a reasonable doubt.[3]

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[2] AS 11.61.118(a)(2).

[3] *See Johnson*, 188 P.3d at 702.

Edwin first claims the State failed to prove that Edwin was the perpetrator of the crimes. The State introduced a substantial amount of evidence to prove that Edwin was the one who harassed the store clerk, but we need not set forth the details of that proof — because, from the outset of the case, Edwin's lawyer *conceded* the issue of identity. The defense attorney began her opening statement by stating that "[o]n May 24, Mr. Edwin went into the Santa Senior Center to look in the gift shop." And during final argument, the defense attorney said, "From the second that Peter walked into the Santa Senior Gift Shop on May 24, [the clerk] got a bad vibe from him." The defense attorney, apparently referring to her client, argued that it was not a crime to be "a creepy person."

Since the defense unambiguously conceded that Edwin was the person in the gift shop, we reject Edwin's claim that the evidence was insufficient to establish this element.

Edwin also challenges the sufficiency of the evidence that his physical contact with the clerk's buttocks was an *offensive* touching; given the cramped nature of the gift store, Edwin argues that there was ample opportunity for inadvertent contact. And he contends that the State also failed to prove that he intended to harass or annoy the clerk.

But the clerk testified that, at one point, she could "feel a pressure in the back by [her] buttocks and then [she] could feel [Edwin] pumping up and down on his penis." She testified that she felt both the tip of Edwin's penis on her buttocks and the rhythmic movement of his hand.

This testimony, if believed, was sufficient to establish that Edwin engaged in offensive touching with the intent to harass or annoy the clerk.

The two harassment convictions must merge

Based upon the fact that the incident occurred in two separate rooms, the State charged Edwin with two separate counts of harassment. But, as the State now concedes, Edwin engaged in one continuous course of conduct.[4] The rooms were close to one another, the transit between them took but seconds, and the fact that they were not physically joined was a fortuity. We therefore find the State's concession of error to be well taken.

Why we uphold the probation-revocation sentence

The State filed a petition to revoke Edwin's probation in the superior court because of his conduct at the Santa Senior Center. Edwin was on probation from a 2002 attempted sexual abuse of a minor conviction for which he was sentenced to 15 years with 5 suspended and 5 years' probation. Edwin also had an attempted sexual abuse of a minor conviction in 1996 and convictions for assault in 1988 and 1989. The victims in his attempted sexual abuse cases were four and twelve years old.

Moreen Fried, a licensed clinical social worker with thirty years' experience working with sex offenders, testified at Edwin's disposition hearing. Fried described Edwin's significant history of physical and sexual assaults perpetrated against him since he was a young child, including sexual assaults perpetrated on him by his mother and three men, and his mother's pouring of hot grease on his arm as punishment. Fried also described her knowledge of Edwin's criminal history, which began when he stabbed a

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[4] *See Moore v. State*, 123 P.3d 1081, 1093-94 (Alaska App. 2005) (holding that merger is appropriate absent significant differences as to intent and conduct relative to protected societal interests); *Allain v. State*, 810 P.2d 1019, 1021 (Alaska App. 1991) (holding merger appropriate in light of closely related conduct arising from a single criminal episode of sexual contact with the same victim).

police officer at age nineteen. She noted that Edwin had disclosed to her "[previously] unreported rape victims," and that Edwin had "an incredibly extensive physical violence history, especially while he was incarcerated."

Fried treated Edwin in 2010 after his release from prison. He initially bullied other group members, but he eventually became a leader in group therapy. Fried testified that "he did very, very well" and that he told her that "he wanted to learn how to live on this side of the fence." She was concerned that a significant term of imprisonment would cause Edwin to revert to his prior violent persona.

In his sentencing remarks, the judge acknowledged he was faced with a difficult choice between alternative dispositions. On one hand, a more rehabilitative disposition involving less incarceration would decrease the risk that the prison environment would cause Edwin to revert to his prior violent behaviors. On the other hand, Edwin had recently completed the intensive portion of his sex offender treatment, and then within three months had victimized a vulnerable person.

Faced with these facts, the judge estimated Edwin's prospects for rehabilitation as "somewhere between guarded and good." And while he acknowledged that incarceration might reverse the progress that Edwin had painstakingly made in therapy, the judge ultimately found that isolating Edwin and thereby protecting the public assumed primacy as a sentencing factor. He thus imposed 3 years of Edwin's suspended time. We have reviewed the record and find that the sentence was not clearly mistaken.[5]

Edwin also argues that the judge's sentence effectively punished him for appealing. Fried informed the court that Department of Corrections policy prohibits prisoners from participating in sex offender treatment during the pendency of an appeal.

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[5] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

The judge then acknowledged the practical consequences that flowed from Edwin's decision to appeal — that the therapist could not testify as knowledgeably as if she had Edwin back in treatment, and that he was apparently disqualified from treatment pending resolution of his appeal. But it cannot be said that the judge somehow punished Edwin for exercising his right to appeal simply because the judge acknowledged certain unavoidable ensuing consequences of that appeal.

(We note that the judge and parties operated under the assumption that the Department of Corrections policy precluded Edwin from participating in treatment during the pendency of his appeal. Evidence of this policy is not squarely before the Court. We thus take no position on whether such a policy in fact exists, nor do we pass on its propriety.)

Conclusion

We AFFIRM the judgment of the district court convicting Edwin of first-degree harassment, but we REMAND the case for a merger of the charges and for re-sentencing. We AFFIRM the sentence imposed by the superior court in the probation revocation proceeding.